Supreme Court, U.S.
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No. 92-6281

In The

Supreme Court of the United States

October Term, 1993

ROBERT P. HAGEN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Utah

BRIEF OF PETITIONER

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QUESTION PRESENTED

Did the Supreme Court of Utah, in the case of *State v. Perank*, properly decide that the Uintah and Ouray Indian Reservation was diminished by the Act of May 27, 1902, Ch. 888, 32 Stat. 245, so as to confer upon the State of Utah criminal jurisdiction over Petitioner, Robert P. Hagen?

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OPINIONS BELOW

The opinion of the Supreme Court of Utah in *State v. Hagen* is unofficially reported in 191 Utah Adv.Rep. 26, 19 Indian Law Rep. 5190 (1992), and reprinted in the Joint Appendix at J.A. 15. The opinion of the Utah Court of Appeals in *State v. Hagen* is found at 802 P.2d 745 (Utah App.1990). The opinion of the Utah District Court in *State v. Hagen*, Duchesne County Case No. 89CR41D, January 22, 1989, is found in the Record, page 61. The opinion of the Utah Supreme Court in *State v. Perank* is unofficially reported in 191 Utah Adv.Rep. 5, 19 Indian Law Rep. 5191 (1992), and reprinted at J.A. 18. The opinion of the United States Court of Appeals for the Tenth Circuit *en banc* in *Ute Indian Tribe v. State of Utah* is reported at 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), and reprinted at J.A. 88. The panel opinion of the Tenth Circuit Court of Appeals in *Ute Indian Tribe v. State of Utah* is reported at 716 F.2d 1298 (1983). The opinion of the Federal District Court in *Ute Indian Tribe v. State of Utah* is reported at 521 F.Supp. 1072 (D. Utah 1981).

JURISDICTION

The judgment of the Utah Supreme Court in *State v. Hagen*, and *State v. Perank*, was entered on July 17, 1992. There was no motion for reconsideration. Petitioner brought his petition under 28 U.S.C. § 1257(3).

On August 4, 1992, in the case of *State v. Perank*, the Supreme Court of Utah stayed the issuance of its remittitur and "the finality of the judgment of the Court" pending the conclusion of any proceedings on certiorari

to the Court, and "the final disposition of the injunctive proceedings pending in the United States District Court for the District of Utah."[1] (Reprinted in Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of *Certiorari*, p. 12-A) Mr. Perank did not seek a writ of certiorari to the Court.

On August 18, 1992, in the Petitioner's case, *State v. Hagen*, the Supreme Court of Utah stayed the issuance of its remittitur for 90 days pending Petitioner's "decision to file a petition for a writ of certiorari in the United States Supreme Court." (Reprinted in Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of *Certiorari*, p. 13-A)

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendments Six and Fourteen of the Constitution of the United States are reprinted in Mr. Hagen's Appendix

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[1] On September 2, 1992, *nunc pro tunc*, August 3, 1992, the United States District Court, District of Utah, Central Division, in Civil Action No. C75-408J, *Ute Indian Tribe v. State of Utah and Duchesne County, Uintah County, Roosevelt City, and Duchesne City*, issued an Order, incorporating an attached Stipulation by reference. In part, that Order stated: "The parties shall comply with the provisions of said stipulation until this Court issues its decision on the merits of the Tribe's Renewed Motion for Injunctive Relief or until such other date as is fixed by agreement between the parties or by order of this Court." The Stipulation incorporated by reference includes the following language: "1. The State, local defendants, their officers, agents, employees and any person acting in their behalf shall refrain from enforcing the Utah Supreme Court's decision in *State v. Perank*, No. 8602433 (Utah July 17, 1992). . . . " (the order of the Federal District Court with its attached Stipulation is reprinted in Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of *Certiorari*, pp. 5-A - 11-A) To the Petitioner's knowledge the aforementioned Order and Stipulation remain in effect.

at A-1. 18 U.S.C. §§ 1151, 1152 & 1153 are reprinted in Mr. Hagen's Appendix at A-2. Statutes and Presidential Proclamations relevant to the Uintah Valley Reservation may be found at J.A. 159-184 including: 1) 32 Stat. 245, 263, as amended, J.A. 159; 2) 32 Stat. 982, 997-998, J.A. 163; 3) 33 Stat. 189, J.A. 166; 4) 33 Stat. 1048, 1069-70, J.A. 166; and, 5) Presidential Proclamation of July 14, 1905, 34 Stat. 3119, J.A. 176. These, and other statutory materials considered by the Federal District Court may be found in *Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D. Utah 1981).

STATEMENT OF THE CASE

A. Introduction

Robert P. Hagen is a criminal defendant. His liberty is at issue in this appeal. Though the Court's disposition of this appeal may also affect other Indians living in the Uintah Valley Reservation in northeast Utah, it is certain to have direct and lasting consequences in Mr. Hagen's life.

At its roots, this case involves the issue of criminal jurisdiction in the small town of Myton, Utah. Myton was the site of Mr. Hagen's criminal charge under the State of Utah law. Mr. Hagen, a mixed-blood Chippewa, believed Myton was in Indian Country, within the exterior boundaries of the Uintah Valley Reservation portion of the Ute Indian Tribe's Uintah and Ouray Reservation. He relied upon his Indian identity and the precedent and collateral estoppel effect of the decision in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*), cert. denied, 479 U.S. 994 (1986) (hereinafter, "*Ute Tribe en banc*"), and on the decision below, *Ute Indian Tribe v. State of Utah*, 521

F.Supp. 1072 (D. Utah 1981) (hereinafter *"Ute Tribe District Ct."*) to challenge Utah's assertion of criminal jurisdiction. Ultimately, his challenge failed before the Utah Supreme Court which decided, contrary to the federal courts, that the Uintah Valley Reservation had been disestablished and that Myton, therefore, was not in Indian Country, *Utah v. Hagen*, 191 Utah Adv.Rep. 26, 19 ILR 5190 (1992) (hereinafter *"Hagen"*).[2]

Lurking behind Mr. Hagen's presence before this Court is the ten-year-old scheme of the State of Utah to relitigate the findings in *Ute Tribe en banc, id.* Therefore, the "rest of the story" involves the role played by the State of Utah to achieve its ulterior motive, the disestablishment of the Uintah Valley Reservation through the device of two simultaneous criminal appeals – Mr. Hagen's and that of Clint Perank, also a mixed-blood Indian. *See, Utah v. Perank*, 191 Utah Adv.Rep. 5, 19 ILR 5191 (1992) (hereinafter *"Perank"*).

B. Hagen Case – Statement of Facts

Robert Palmer Hagen is an enrolled member of the Little Shell Band of Chippewa Indians of Montana, a non-federally-recognized Tribe. At the time of arrest in 1988, he had lived for five to six years on the Ute Reservation on nontrust land in the vicinity of Myton, Utah. Throughout his life he has identified himself as, and has considered himself to be, an Indian.

On or about April 19, 1988 (R.1), the State of Utah filed charges against Mr. Hagen for crimes which allegedly took place at his trailer in Myton, Utah. On or

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[2] State criminal jurisdiction does not extend to Indians who commit crimes in Indian Country. 18 U.S.C. § 1151, 1152, 1153 (1982 & Supp. 1992)

about July 28, 1988, the Duchesne County prosecutor dismissed those charges on motion to the court, in the mistaken belief that federal charges had been filed (R.17).

On or about March 13, 1989, the State refiled the charges previously dismissed without prejudice, having learned that no federal prosecution had taken place (R.19). The state charged Mr. Hagen with two third-degree felonies and one class B misdemeanor, i.e., distribution of a controlled substance (marijuana), possession of a controlled substance with intent to distribute, and possession of paraphernalia (R.20).

On or about August 28, 1989, after plea negotiations, Mr. Hagen entered into a guilty plea for distribution of a controlled substance, a third-degree felony, and the State moved to dismiss further charges against him (R.33).

On or about January 4, 1990, after having obtained new counsel, Mr. Hagen moved to withdraw his guilty plea and to arrest judgment on the basis of the Utah district court's lack of subject matter jurisdiction over an Indian in Indian Country (R.53-58). On or about January 22, 1990, in an evidentiary hearing considering Mr. Hagen's Indian status, where Mr. Hagen was the sole witness, he was examined, cross-examined, examined on redirect, and on recross. The State produced no witnesses, and only one exhibit. After oral argument, in the course of which the State conceded or stipulated to most of the defendant's evidence of Indian identity, the Utah district court affirmed Utah's criminal jurisdiction by holding that Mr. Hagen was not an Indian. (R.81-117) Thereby the judge avoided reaching the issue of Uintah Valley Reservation disestablishment, openly expressing that he would not have been able to rule on the disestablishment question because of his longstanding bias as a result of years of litigating that issue (R.105).

On or about February 15, 1990, Mr. Hagen filed his appeal in the Utah Court of Appeals (R.65-66). Mr. Hagen raised both aspects of subject matter jurisdiction, his Indian identity, which was argued extensively, and the Indian Country aspect, which was summarily discussed by reference to the federal courts' holding in *Ute Tribe en banc*. Brief of Appellant, (Hagen), Utah Court of Appeals, *State v. Hagen*, 802 P.2d 745 (Utah. App. 1990).

On November 23, 1990, the Utah Court of Appeals discharged Mr. Hagen, reversing the court below on the jurisdictional question. *See, State v. Hagen*, 802 P.2d 745 (Utah App. 1990). It held that the State had failed to prove under established state law procedures that Mr. Hagen was not an Indian. It also held that, on the basis of the federal court's ruling in *Ute Tribe en banc*, the Uintah Valley Reservation had not been disestablished so as to exclude Myton from its boundaries. On the basis of collateral estoppel and the Supremacy Clause, the Utah Court of Appeals believed that the Utah Supreme Court in a related case – *Perank* – (discussed, *infra*) could not reach a decision contrary to the findings in *Ute Tribe en banc*. Therefore, the Court of Appeals declined to delay its decision, as had been requested by the State of Utah, and freed Mr. Hagen from custody.

On or about April 23, 1991, the Utah Supreme Court granted the State of Utah's petition for certiorari in the *Hagen* case. Mr. Hagen advanced a strong collateral estoppel argument to challenge Utah's jurisdiction, relying on the *Ute Tribe en banc* holding. Brief of Appellee, (Hagen), Utah Supreme Court, p. 6-14, *Utah v. Hagen, supra*. The State of Utah diverted the Utah Supreme Court's attention from making a disestablishment ruling in *Hagen*, and directed it to making that ruling in *Perank (infra)*. Brief of Appellant, (Utah), p. 1-5, *Utah v. Hagen, supra*. Perank had

never raised collateral estoppel. *See*, Perank Briefs, *Utah v. Perank, supra*.

On July 17, 1992, the Utah Supreme Court issued simultaneous decisions in three cases, Mr. Hagen's, and the cases of Patrick Coando, and Clint Perank. *See, Perank, supra; Hagen, supra;* and *Utah v. Coando*, ___ Utah Adv.Rep. ___, 19 ILR 5189 (1992). In the latter case, the Supreme Court of Utah held that the Uintah Valley Reservation had been disestablished, resulting in State court jurisdiction in the area of Myton. In a summary opinion, the Utah Supreme Court decided the *Hagen* case by reference to its decision on the reservation boundary issue in *Perank*. The Utah Supreme Court never adjudicated Mr. Hagen's collateral estoppel defense in his case. *Utah v. Hagen*, 19 ILR 5190.

C. Perank Case – Statement of Facts

Perank, although decided by the Supreme Court of Utah on the same date as Mr. Hagen's case, antedates Mr. Hagen's case by a number of years. The factual background and procedural posture of Perank are part of the backdrop of Mr. Hagen's case. By virtue of the State's consistent cross-referencing throughout the appellate process, *Perank* became indissolubly linked to Mr. Hagen's appeal. Clint Perank pled guilty to burglary, a third-degree felony charge, and was sentenced on October 27, 1983. On April 21, 1986, after a number of probation violations, Mr. Perank was summoned to court to answer for the latest violations. At that time, he challenged Utah's jurisdiction on the basis of his Indian identity and the situs of his alleged crime, Myton, Utah, which he alleged was within the Uintah Valley Reservation in Indian Country. The Utah District Court rejected

this argument, leading to Mr. Perank's appeal on May 13, 1986.

In the course of Mr. Perank's appeal, the Utah Court of Appeals transferred *Perank* to the Utah Supreme Court. The appeal was delayed, in part, by stipulation of the parties pending the resolution of the State of Utah's attempt to obtain review from this Court of the decision in *Ute Tribe en banc*. *Perank* resumed upon the Court's 1986 denial of certiorari in *Ute Tribe en banc*.

Amicus briefs were invited from the Ute Indian Tribe and the United States of America, and upon motion were allowed for the Utah counties of Duchesne and Uintah. The *amici curiae* strongly urged the Utah Supreme Court to disestablish the Uintah Valley Reservation as virtually the only way to insure its ultimate litigation before the United States Supreme Court. Brief of Duchesne and Uintah Counties (*Perank*), Utah Supreme Court, p. 3-9. The Utah Supreme Court heard oral argument in the *Perank* case on October 11, 1988, then took almost four Years, until July 17, 1992 in which to issue its decision disestablishing the Uintah Valley Reservation, during which time it chose to grant the State's petition for certiorari in *Hagen*. Myton, Utah, the situs of Mr. Perank's alleged crime, was declared not to have been in Indian Country. The *Perank* holding was transferred to the holdings in *Hagen* and *Coando* decided on the same date.

D. Uintah Valley Reservation – Litigation History

Whether the State of Utah can prosecute Indians in *Hagen* and in *Perank* arises from the legal history of the Uintah Valley Reservation. By the Act of May 5, 1864, 13 Stat. 63, chap. LXXVII Congress established the Uintah Valley Reservation as a permanent home for the Ute Indian Tribe. Subsequently, the Act of March 3, 1905, 33

Stat. 1048, 1069-71 opened the Reservation lands, including the townsite of Myton, to nonIndian settlers.

On October 15, 1975, the Ute Indian Tribe brought suit in the federal district court in Utah to establish the exterior boundaries of the Reservation. On June 19, 1981, in an exhaustive eighty-five-page, detailed analysis, the federal district court held that the 1905 Act did not disestablish the Uintah Valley Reservation, and for purposes of this current litigation, the town of Myton remained therein. *Ute Tribe District Ct., supra*. In 1985 the United States Court of Appeals for the Tenth Circuit, *en banc*, affirmed that the Uintah Valley Reservation had not been disestablished and also ruled that the Uncompahgre Reservation, a second Ute Reservation, had not been disestablished. *Ute Tribe en banc*. The Court denied Utah's petition for writ of certiorari on December 1, 1986, 479 U.S. 994 (1986).

Throughout the course of the litigation of *Hagen* and *Perank* in the Utah courts, the State and both criminal defendants referred to the *Ute Tribe* cases. Utah has unflaggingly disputed the *Ute Tribe en banc* holding and both Mr. Perank and Mr. Hagen have consistently used that decision as a precedent, binding upon the Utah courts, and in Mr. Hagen's case, as a precedent collaterally estopping the State from relitigating the issue of the Uintah Valley Reservation boundary.

SUMMARY OF ARGUMENT

Before the federal courts in the 1970s and 1980s, the State of Utah and its subdivisions, Duchesne and Uintah Counties, sought a full and fair determination of the boundaries and status of the Uintah and Ouray Indian Reservation, including the status of the Uintah Valley Reservation established by the Act of May 5, 1864, 13 Stat.

63, Chap. LXXVII. Indeed, the State through its Counties, told the United States Court of Appeals for the Tenth Circuit that its 1985 *en banc* review of the issue will define "once and for all, the governmental authority of the various parties in the area involved."

Notwithstanding that pledge to the federal courts, when the United States Court of Appeals for the Tenth Circuit issued *Ute Tribe en banc* in favor of the Ute Indian Tribe, the State of Utah undertook state law prosecution of three Indian defendants in an effort to reverse the holding of the United States Court of Appeals for the Tenth Circuit. In the first of those efforts, *Perank*, Duchesne and Uintah Counties urged the Utah Supreme Court to disavow the United States Court of Appeals for the Tenth Circuit *en banc* holding, stating, "A conflict between a state supreme court and a court of appeals is practically a prerequisite for *certiorari* to be granted in cases of this nature. *Amici* would submit that this is the case and now is the time for the view of this Court to be expressed." Brief of Duchesne and Uintah Counties, *amici curiae*, in support of State of Utah, *Perank*, p. 3.

In order to effect a satisfactory end run around the holding in *Ute Tribe en banc*, the Utah Supreme Court thereafter submerged the appeal of Mr. Hagen, the petitioner here, into the appeal of Clint Perank. Had the Utah Supreme Court directly confronted the Court's collateral estoppel teachings raised by Mr. Hagen, Mr. Hagen's prosecution would have been dismissed in recognition of the holding in *Ute Tribe en banc*. But, because the Utah Supreme Court elected to submerge the Hagen appeal into the *Perank* appeal, where collateral estoppel was not raised, Mr. Hagen's meritorious defense of collateral estoppel was never adjudicated, thereby denying Mr. Hagen his federal due process right to a full and fair

appellate review under the Fourteenth Amendment, and his federal right to effective assistance of counsel under the Sixth and Fourteenth Amendments. These violations of Mr. Hagen's rights require that his prosecution be dismissed with prejudice.

Under the holding in *Ute Tribe en banc* Mr. Hagen is entitled to be prosecuted, if at all, by the United States and/or the Ute Indian Tribe. The Tenth Circuit Court of Appeals faithfully applied the Court's settled precedent in holding that the Act of March 3, 1905, 33 Stat. 1048, 1069-71, did not disestablish the Uintah Valley Reservation. If the Court reaches the merits of the boundary issue in this appeal, it should find, as did the Court of Appeals *en banc* eight years ago, that the language utilized by Congress, the legislative history, and surrounding circumstances all indicate that Congress intended to open the Uintah Valley Reservation in order to permit nonIndians and Indians to live side-by-side. Nothing in the Act, the legislative history, nor the surrounding circumstances demonstrates a clear understanding on the part of the Ute Indians that they were renouncing their Reservation boundary. Under the Court's settled precedent, therefore, the Uintah Valley Reservation should be found to be intact, and Mr. Hagen's criminal prosecution should be dismissed with prejudice.

ARGUMENT

I. THE UTAH SUPREME COURT IMPROPERLY DECIDED THE UINTAH VALLEY RESERVATION BOUNDARY, BECAUSE THE TENTH CIRCUIT EN BANC DECISION IN *UTE INDIAN TRIBE V. UTAH* COLLATERALLY ESTOPS THE STATE OF UTAH FROM ASSERTING CRIMINAL JURISDICTION OVER ROBERT HAGEN.

A. Introduction and Elements of Collateral Estoppel

The State of Utah's case against the defendant should be dismissed with prejudice because the doctrine of collateral estoppel precludes the State from relitigating its subject matter jurisdiction within the exterior boundaries of the Uintah Valley Reservation. Robert Hagen challenged the subject matter jurisdiction of the State of Utah to prosecute him on criminal charges. He based his challenge on Federal criminal law, i.e., 18 U.S.C. §§ 1151, 1152 and 1153 (R.54-58). This statutory scheme mandates Federal court jurisdiction, provided: 1) the criminal suspect is an Indian; and, 2) the situs of the crime is in Indian Country. Although Mr. Hagen and the State disputed his Indian status in the trial court, the Utah Court of Appeals overruled the trial court, and found Mr. Hagen was an Indian. *State v. Hagen*, 802 P.2d 745 (Utah App. 1990). In its subsequent review of Mr. Hagen's case, the Utah Supreme Court declined to rule on Mr. Hagen's Indian status, thereby leaving the Court of Appeals' decision standing in that regard.[3] Hence, only the question of

[3] The finding that Mr. Hagen is an Indian was made pursuant to State of Utah procedures requiring the State of Utah to disprove Indian status once a criminal defendant claims he is an Indian. That finding, made under the law of the State of Utah, is

Indian Country was ruled on by the Utah Supreme Court and remains at issue in this appeal.

The situs of Mr. Hagen's alleged crime, Myton, Utah, lies within the exterior boundaries of the Uintah Valley Reservation, as determined in *Ute Tribe en banc*. On the basis of this federal precedent, Mr. Hagen argued before the Utah Supreme Court that the State was collaterally estopped from challenging the Reservation boundaries in an attempt to obtain jurisdiction over him, the Utah Court of Appeals having determined collateral estoppel would apply to defeat the State's jurisdiction. *State v. Hagen*, 802 P.2d at 747.

On appeal by the State to the Utah Supreme Court, Mr. Hagen argued vigorously that the Court should recognize the Tenth Circuit *en banc* decision not only as a precedent but also as collaterally estopping the State on this jurisdictional issue. Appellee's (Hagen's) Brief, p. 614, *Hagen, supra*. The Utah Supreme Court did not address Mr. Hagen's defense of collateral estoppel. *Hagen, supra*. Instead, it ruled summarily, by reference to its decision in *Perank*, that the State had properly exercised criminal jurisdiction over Mr. Hagen because the Uintah Valley Reservation had been disestablished. In so doing, the Utah Supreme Court impermissibly penalized Mr. Hagen for Mr. Perank's failure to raise the collateral estoppel defense. The Supreme Court completely ignored Mr. Hagen's collateral estoppel arguments. This defense, a threshold matter going to the subject matter jurisdiction of the Utah courts, is appropriate for review by the Court.

Collateral estoppel may be used in a criminal case, *Ashe v. Swenson*, 397 U.S. 436 (1970), including one in

binding on the State of Utah and accordingly is not an issue in the appeal.

which the case in which the estoppel arises is not criminal, but rather is civil. *Yates v. United States*, 354 U.S. 298 (1957) (overruled on other grounds); *United States v. Baltimore & Ohio Railroad Co.*, 229 U.S. 244 (1913). In Mr. Hagen's criminal case, the estoppel arises from the findings in *Ute Tribe en banc*, a civil action seeking declaratory judgment. Federal collateral estoppel law, therefore, allows Mr. Hagen to raise issues from *Ute Tribe en banc* for estoppel purposes in his criminal case. Moreover, because "[t]he criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed," *Allen v. McCurry*, 449 U.S. 90, 116 (1980) (Blackmun, J. dissenting), "[t]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444.[4]

The courts of Utah should have applied the federal law of collateral estoppel to find that the Utah courts lacked subject matter jurisdiction over Mr. Hagen.[5] The following eight components are satisfied in this appeal.

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[4] Collateral estoppel can be raised to challenge jurisdiction, including subject matter jurisdiction. *See, e.g., Veiser v. Armstrong*, 688 P.2d 796 (Ok. 1984).

[5] The federal law of collateral estoppel, not Utah law, applies to this case, because: 1) it is a federal-question case, (*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324, n.12 (1971)); 2) it involves issues of importance pertaining to the relationship of the United States to its Indian wards, *Seymour v. Superintendent Of Washington State Penitentiary*, 368 U.S. 351, 353-54 (1962)); and, 3) "[t]he . . . preclusion effect of the earlier judgment is determined solely by the law of the forum, state or federal, which rendered it." *United States v. Hatrak*, 588 F.2d 414, 419 (3rd Cir. 1978). Here, the issue preclusion derives from the holdings in *Ute Tribe en banc*.

The Utah courts should have found that the federal courts in *Ute Tribe District Ct.*, and *Ute Tribe en banc:* 1) were courts of competent jurisdiction, *Montana v. United States*, 440 U.S. 147, 153 (1979); 2) determined "an issue of fact or law," *Allen*, 449 U.S. at 94 in common between the first action and the estoppel action, *Blonder-Tongue*, 402 U.S. at 328-29; 3) which issue was "necessary to [the first court's] judgment," *Allen*, 449 U.S. at 94; and, 4) made a "valid and final judgment," *Ashe*, 397 U.S. at 443. Additionally, the Utah courts, by comparing the parties in the two actions and by examining the litigation in the first action, should have found that the party against whom the estoppel is sought in the estoppel action: 5) was a party in the first case, *Allen*, 449 U.S. at 94; 6) had a "full and fair opportunity" to litigate the issue in the first case, *Allen*, 449 U.S. at 95; 7) is not the Government in a situation wherein the *Mendoza* case applies, *United States v. Mendoza*, 464 U.S. 154 (1984); and 8) is not embraced by any other exception to the rule of collateral estoppel, as a result of the particular circumstances attendant upon the estoppel case. *Montana, supra.*

As noted above, the Utah Supreme Court did not directly address Mr. Hagen's collateral estoppel arguments, neither under Federal nor Utah law. As the following argument will show, Mr. Hagen should have prevailed on his collateral estoppel argument before the Utah courts, and should prevail on it now. Mr. Hagen will limit his discussion solely to those elements from the preceding list which require clarification.

B. The Uintah Valley Boundary Issue in the Federal Courts Was Identical to the Indian Country Issue in the Utah courts.

In *Ute Tribe en banc*, at 1093, the court held:

> In closing, we find no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations.

The federal courts' finding that the Uintah Valley Reservation boundaries were undiminished and the Uintah Valley Reservation had not been disestablished was the exact issue which Mr. Hagen presented, and on which he relied, and does now rely, to establish his collateral estoppel defense. Before the Supreme Court of Utah, Mr. Hagen stated:

> In its brief, the State correctly asserts that the issue of whether Myton is within the confines of the Ute Indian Reservation is an issue pending before this court in *State v. Perank*, No. 860196. The issue in *Ute Indian Tribe, Perank* and the instant case is identical. The issue is 'whether the Uintah Reservation was diminished. . . .'

Appellee's (Hagen's) Brief, p. 8, *Hagen, supra.*

Hence, Utah cannot deny that the subject-matter jurisdictional-predicate issue decided in the federal courts is not the same subject-matter jurisdictional-predicate issue Mr. Hagen raised and argued in his jurisdictional challenge before the Utah courts. The issues are the same.

C. Whether the Uintah Valley Reservation Had Been Disestablished or Diminished Was Necessary to the Decision of the Tenth Circuit Court of Appeals, en banc.

The status of the Uintah Valley Reservation was the focus of attention, not the periphery of concern in the

federal court litigation. It produced volumes of controverted testimony and briefing, not gratuitous commentary; and, resulted in an actual holding, not mere dicta. *See, Ute Tribe District Ct.*, and *Ute Tribe en banc.* It answered specifically one of the questions asked by the Ute Tribe when it initiated the declaratory judgment action in the federal courts. Therefore, this issue was necessarily decided by the Tenth Circuit, and was essential to the Tenth Circuit's judgment.

D. The State of Utah is the Same Party in Both the Federal and State Actions.

There is but one State of Utah. As the briefs and published cases reveal, consistently, throughout the *Ute Tribe* cases, culminating in *Ute Tribe en banc* and the State's unsuccessful bid for certiorari review, the State appeared through its Attorney General and through teams of assistant attorneys general. Throughout much of its federal court sojourn it was also joined by several of its own political subdivisions, e.g., Duchesne County, through their own county attorneys and their respective teams.[6]

In *Hagen* and *Perank*, the County attorneys prosecuted the defendants in the name of the State of Utah, under that state's criminal prosecution scheme. Once *Perank* and *Hagen* entered the appellate stream, however, the Attorney General of the State of Utah and teams of assistant attorneys general handled the prosecution. Some of

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[6] Only the status of the Uintah Valley Reservation is at issue in this litigation. Utah has not challenged *Ute Tribe en banc* regarding the National Forest lands associated with the Uintah Valley Reservation, nor challenged the integrity of the Uncompahgre Reservation.

the same political subdivisions, e.g., Duchesne County, submitted *amicus curiae* briefs in *Perank*.

The briefs in *Hagen* refer to, and annex *Perank* briefs, in pertinent part, as discussed, *supra*. Moreover, *Perank*, itself, incorporates by reference the record of the *Ute Tribe* cases in the federal courts. Therefore, the State of Utah cannot now argue that separate, unequal branches or levels of its government, e.g., civil authority vs. criminal enforcement authority, effectuating different goals, and having different restraints, independently pursued disparate objectives in the two lines of cases. The State, itself, by consolidating the records of the federal cases into *Hagen* and *Perank*, has vitiated any argument it might otherwise have been able to make to the effect that the "State of Utah" in the *Ute Tribe* cases is distinguishable from the "State of Utah" in *Perank* and *Hagen*. There is but one State of Utah here for collateral estoppel purposes.

E. The State of Utah had a Full and Fair Opportunity to Litigate the Uintah Valley Reservation Boundary Issue in the Federal Courts.

> [O]ne general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case.

Allen, 449 U.S. at 95.

The Court has recognized further that there is no "automatic formula for proper rulings on estoppel pleas," *Blonder-Tongue*, 402 U.S. at 334, and that such rulings must finally "rest on the . . . courts' sense of justice and equity." *Id.* Throughout the briefing history of *Hagen* and *Perank*, the State of Utah never alleged that it had been

deprived by the federal courts of a full and fair opportunity to litigate its interests in the *Ute Tribe* cases. On the contrary, the State of Utah has virtually vouched for the fullness and fairness of its prior opportunity in the *Ute Tribe* cases by incorporating the record therein into *Perank* and *Hagen*, without caveat.[7] A straight-faced argument that the procedures in the *Ute Tribe* cases were incomplete or unfair vis-a-vis the State of Utah would seem impossible. In reaching its decision on the Reservation-boundary issue, the district court took testimony from 18 witnesses, and admitted more than 800 documentary exhibits. The District Court stated:

> Besides giving careful scrutiny to these documents and the record at trial, t[he district] court . . studied the extensive pretrial memoranda and post-trial briefs submitted by the parties and the United States as *amicus*, and . . . examined numerous historical documents authenticated in the discovery process but not included in the compilation of joint exhibits offered at trial, and other learned treatises and historical works that [were] relevant to this Court's determinations.

Ute Tribe District Ct. at 1080.[8]

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[7] Moreover, it is especially worth noting that both the State of Utah and its courts have supported the jurisdictional competency of the Federal Courts, and have relied exclusively on the "voluminous" factual record on review before the Tenth Circuit in the *Ute Tribe* case. *See*, Brief of Respondent in Support of Petition for Writ of Certiorari, pp. 3, 11, & Appendix E – stipulations.

[8] Utah has admitted that it received a full and fair trial in its Appellee's Brief in *Ute Tribe en banc*: "While Utah did not receive all that it requested in the lower court, it does feel that it had a fair trial, and that it is virtually impossible for any party to present a persuasive argument to show that the district court committed reversible error."

Therefore, Mr. Hagen firmly believes that under any reading of "justice and equity" the State of Utah had a full and fair opportunity to litigate the *Ute Tribe* cases, and specifically the jurisdictional predicate issue salient to Mr. Hagen's case, the boundary and existence of the Uintah Valley Reservation.

F. Mr. Hagen can collaterally estop the State of Utah, the case of *United States v. Mendoza* notwithstanding.

After the doctrine of mutuality became moribund in *Blonder-Tongue, supra,* this Court openly approved the use of nonmutual offensive collateral estoppel. *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979) Thereafter, it was conditionally possible for a nonparty to a prior action to use collateral estoppel in a later action against a party to the prior action who happened to oppose him in the later action.

Subsequently, in *Mendoza, supra,* the Court limited the use of nonmutual offensive collateral estoppel against the United States Government. *Mendoza,* 464 U.S. at 162. *Mendoza* involved a private party who sought to use collateral estoppel solely against the United States. Mr. Hagen, on the other hand, is a private party seeking to use collateral estoppel against the State of Utah, not against the United States.[9]

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[9] *Mendoza* was decided nearly ten years ago. Mr. Hagen has been unable to locate any published state court decisions applying *Mendoza* to shield state government from collateral estoppel. The Eleventh Circuit applied *Mendoza* to prevent collateral estoppel against the State of Florida, *Hercules Carriers, Inc. v. Claimant State of Florida, Department of Transportation,* 768 F.2d 1558 (1985), a decision other Circuits have declined to follow. *See, Benjamin v. Coughlin,* 708 F.Supp. 570 (S.D.N.Y. 1989), *aff'd* 905 F.2d 571 (2nd Cir. 1990). Although the Utah Supreme Court in *Perank, supra,* n.3, cited *Mendoza* and *Hercules Carriers, supra,* the Utah Supreme Court did not adopt *Mendoza*'s holding, or state that it was prepared to hold that parties cannot use collateral estoppel against the State of Utah.

As stated below, the ruling in *Mendoza* does not apply to prevent Mr. Hagen's defense of collateral estoppel. This Court limited its holding in *Mendoza* to "issues such as those involved in this case." *Mendoza,* 464 U.S. at 162. The collateral estoppel issue in *Mendoza* was that the United States, in the circumstances relevant to the *Mendoza* case, had violated the guarantee of Due Process under the Fifth Amendment to the United States Constitution. Thus, the narrowest reading of the holding is that it reaches only issues of Fifth Amendment Due Process. However, the following passage, in particular, from the policy discussion in *Mendoza* suggests that the Court desired to encompass significant public issues which affect citizens throughout the land:

> Government litigation frequently involves *legal questions of substantial public importance;* indeed, because the *proscriptions of the United States Constitution* are so generally directed at governmental action, many *constitutional questions* can arise only in the context of litigation to which the Government is a party. Because of those facts the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.
>
> A rule allowing collateral estoppel against the Government in such cases would substantially thwart the development of *important questions of law* by freezing the first final decision rendered on the particular legal issue. Allowing

> only one final adjudication would deprive this Court of the *benefit it receives from permitting several courts of appeals to explore a difficult question* before this Court grants certiorari.

Id. at 160 [emphasis supplied]

Because the collateral estoppel issue in Mr. Hagen's dispute involves fact-specific determinations of site-specific federal statutes and federal conduct addressing federal Indian policy ninety years ago in remote and isolated northeast Utah, the policies expressed in *Mendoza* do not apply.

Moreover, the *Mendoza* opinion expressly permits collateral estoppel against the Government if there is mutuality. *Mendoza*, 464 U.S. at 163-164. "The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Bernhard v. Bank of America National Trust and Savings Assoc.*, 122 P.2d 892, 894 (Cal. 1942) (Traynor, J.). Mr. Hagen believes there can be little, if any, doubt that had the *Ute Tribe en banc* case resulted in the disestablishment of the Uintah Valley Reservation, he would have been bound by that decision. He, like other Indians, would have been the subject of state prosecution for actions alleged to have been committed off trust lands.[10] Federal and tribal jurisdiction would have been confirmed over Indian involvement in alleged events taking place on trust lands. Therefore, Mr. Hagen has mutuality in the instant case, and the State of Utah cannot be shielded by *Mendoza*.

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[10] The State of Utah, having brought Mr. Hagen to trial in its courts on the presumption that the *Ute Tribe en banc* decision was wrong, would obviously have been pleased to prosecute him in light of a decision by the federal courts issued in Utah's favor.

G. No Exceptions Prevent Mr. Hagen from Applying the Rule of Collateral Estoppel Against the State of Utah.

In appropriate cases, exceptions to the rule of collateral estoppel may prevent application of the rule. The Court addressed the two most important exceptions in *Montana, supra*: 1) "whether controlling facts . . . have changed significantly since the . . . [first] judgment," *Id.* at 155; and, 2) "whether controlling . . . legal principles have changed significantly since the . . . [first] judgment," *Id.*

1. Controlling Facts Have Not Changed.

Those facts necessary to decide the boundary of the Uintah Valley Reservation derive from *Ute Tribe District Ct.* From the time the district court developed the factual record to the time Mr. Hagen's right to raise collateral estoppel on the boundary issue ripened, those facts did not change. Moreover, they have not changed to date. From immediately after the district court's rulings, the State vouched for the completeness and accuracy of the factual record.[11] As noted, *supra*, the State was instrumental in appending virtually the entire federal district court record to *Perank*, and ultimately to *Hagen*, and asserted no significant change in the facts. Thus, the "change of facts" exception is inapplicable in Mr. Hagen's case.

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[11] A striking example of this is found on pages 2 and 3 of Utah's Tenth Circuit opening brief in the appeal from the District Court's decision: "The ultimate determination of the [district] court [ ] that . . . the Uintah Reservation was not disestablished . . . was carefully reached after a deliberate and painstaking evaluation of thousands of pages of documents, after weighing the testimony of witnesses, after examining maps and photographs, and then by placing this giant mosaic of law and fact into historical and practical perspective."

2. Controlling Legal Principles Have Not Changed.

The controlling legal principles necessary to determine the Uintah Valley Reservation boundary issue are those this Court has set out in its line of reservation diminishment or disestablishment cases construing various surplus land acts of nearly a century ago. *See, e.g., Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *Solem v. Bartlett*, 465 U.S. 463 (1984). *Ute Tribe en banc* considered all of this precedent.[12] No controlling authority has emerged since 1986.

On the basis of the above showings, Mr. Hagen requests the Court to find that collateral estoppel applied against the State of Utah and find that Utah's courts should have dismissed Mr. Hagen's case for lack of subject matter jurisdiction. Mr. Hagen, therefore, also requests this Court to reverse the Utah Supreme Court, and dismiss his case with prejudice.

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[12] Listen again to the words of the State of Utah presented to the federal courts eight years ago: "[I]t is virtually impossible for any party to present a persuasive argument to show that the district court committed reversible error. [ ] [and] the court was sensitive and obedient to all relevant guidance by the decisions of the U.S. Supreme Court." Opening Brief of State of Utah, on appeal to the Tenth Circuit in *Ute Indian Tribe v. Utah*, pp. 2-3.

II. BY SUBMERGING MR. HAGEN'S CRIMINAL APPEAL INTO THE APPEAL OF MR. PERANK, AND, THEREBY, FAILING TO ADJUDICATE MR. HAGEN'S COLLATERAL ESTOPPEL DEFENSE, THE UTAH SUPREME COURT VIOLATED MR. HAGEN'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ASSISTANCE OF COUNSEL.

Mr. Hagen asserts that the State of Utah violated two of his constitutionally guaranteed rights by a single action, namely the Supreme Court's refusal to adjudicate his important defense of collateral estoppel of the Uintah Valley Reservation boundary issue. Since the facts and procedures underlying both violations are the same, Mr. Hagen has combined the analysis of these issues to promote efficiency.

A. Mr. Hagen's Fourteenth Amendment Due Process Rights Were Violated by the Utah Supreme Court's Submergence of His Appeal.

To ensure a defendant "meaningful access to justice," not "mere access to the courthouse doors," *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), the Court has long recognized that "due process of law . . . embraces the fundamental conception of a fair trial, with opportunity to be heard." *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) and that "failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "The hearing, moreover, must be a real one, not a sham or a pretense." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 87 (1935).

When a State, as Utah here, undeniably has established its appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. People of the State of Illinois*, 351 U.S. 12, 18 (1956), "the procedures used in deciding appeals must comport with

the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. at 387, 393 (1985). Moreover, "where its action has significant discretionary elements . . . [the State] must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts*, 469 U.S. at 401. The State may not decide an appeal "in a way that . . . [is] arbitrary with respect to the issues involved." *Evitts*, 469 U.S. at 404.

A fundamental element of due process is the right of a defendant charged with a crime to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). This right is not simply a generalized right; "rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

Mr. Hagen avers that his right to due process under the Fourteenth Amendment has been violated. While Utah permits a litigant to attack subject matter jurisdiction at any time, *Glasmann v. Second District Court*, 12 P.2d 361, 363 (Utah 1932), that right was taken away from Mr. Hagen through the coupling of his appeal with, and the submergence of his appeal into, that of Mr. Perank. Because under Utah law, Mr. Hagen has the right to appeal his conviction to the State Supreme Court, his right to challenge subject matter jurisdiction included the right to make that challenge before the Supreme Court. Moreover, in challenging the power of the State of Utah over him, Mr. Hagen under Utah law was empowered to assert collateral estoppel as a defense. *Perank, supra*, n.3. The Utah Supreme Court's refusal to consider Mr. Hagen's jurisdictional defense is particularly egregious: 1) given the fact that the Utah Court of Appeals had expressly ruled that Utah courts did not have jurisdiction on the basis of collateral estoppel of the jurisdictional predicate; 2) given

the fact that it was the State which appealed Utah's Court of Appeals decision, haled Mr. Hagen into the Utah Supreme Court, and sought reversal of the Court of Appeals on the collateral estoppel issue; and, 3) given the fact that the Utah Supreme Court had discretion to refuse the State's petition for certiorari, and knew it had the *Perank* case before it at the time.

Not satisfied with denying Mr. Hagen his state law right to attack its jurisdiction and to use collateral estoppel in that attack, the Supreme Court of Utah then submerged Mr. Hagen's appeal in *Perank* – a case where the court could say, with a straight face, that Clint Perank had never asserted the *res judicata* (or collateral estoppel) effect of the federal court's decision in the *Ute Tribe* cases. *Perank, supra*, n.3.

The Utah Supreme Court's "extraordinary machinations" to resist federal law, *see, Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 696, n.36 (1979), as described here, deprived Mr. Hagen of a fair hearing and of the minimal standards of due process. As a result, Mr. Hagen's appeal should be dismissed.

B. Mr. Hagen's Sixth Amendment Right to Assistance of Counsel was Violated by the Utah Supreme Court's Submergence of His Appeal.

Mr. Hagen's right to the assistance of counsel under the Sixth Amendment to the United States Constitution, as applied to the States under the Fourteenth Amendment, *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Herring v. New York*, 422 U.S. 852 (1975), "is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). It applies both to appointed and retained counsel, *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), whether in the context of trial or on appeal. *Evitts, supra*. The right exists "not for its own sake, but

because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984), *Lockhart v. Fretwell*, ___ U.S. ___, 113 S.Ct. 838, 842 (1993).

The meaning of the right to the effective assistance of counsel rests in its ability to ensure that the defense has "the opportunity to participate fully and fairly in the adversary . . . process." *Herring*, 422 U.S. at 858. The process must retain its character as a "confrontation between adversaries," or the right to effective assistance of counsel is violated. *Cronic*, 466 U.S. at 657.

A court must guard this right, *Glasser v. United States*, 315 U.S. 60, 71 (1942), along with the defendant's other constitutional rights, and must not, itself, infringe these rights. *United States v. Thompson*, 827 F.2d 1254, 1258 (9th Cir. 1987).

In Mr. Hagen's appeal, his Sixth Amendment guarantee to competent representation was undermined by the very same submergence of appeals, discussed above, that gives rise to his due process violations. Very simply, Mr. Hagen's principal defense, prepared by his counsel, was that collateral estoppel applied to defeat the subject matter jurisdiction of the Utah courts. The "submergence" of Mr. Hagen's appeal vitiated the strategy of Mr. Hagen's counsel in violation of the obligation of the Utah courts to uphold the right to effective assistance of counsel.[13]

To conclude, the coupling of the *Hagen* and *Perank* appeals as handled by the Utah Supreme Court raises

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[13] Wholly independent of the affirmative conduct of the Utah Supreme Court, is the observation of its dissenting justice, Justice Zimmerman, who expressed in unequivocal terms the "unequal and inadequate briefing of the boundary issue" as presented to the court in *Perank, supra*, where the Utah Supreme Court chose to litigate the boundary.

serious questions about the judicial temperament and integrity of the appeals apparatus in the State of Utah, as applied to Mr. Hagen. It has deprived him of his validly asserted, meritorious collateral estoppel defense. For that reason, Mr. Hagen requests the Court to reverse the Utah Supreme Court and dismiss this case with prejudice, on the basis that the Supreme Court of Utah violated Mr. Hagen's rights to due process and effective assistance of counsel under the Fourteenth and Sixth Amendments to the United States Constitution.

III. THE UTAH SUPREME COURT IMPROPERLY DECIDED THE UINTAH VALLEY RESERVATION BOUNDARY ISSUE: THE UINTAH VALLEY RESERVATION REMAINS INTACT – AS A RESULT, INDIANS WITHIN ITS BOUNDARIES ARE SUBJECT TO FEDERAL AND TRIBAL GOVERNMENT AUTHORITY, NOT STATE LAW.

If the Court upholds the State of Utah Supreme Court decision of July 17, 1992, then the State of Utah and its subdivisions will exercise general civil and criminal jurisdiction over Indians whenever they are located off trust lands. On the other hand, if the Uintah Valley Reservation is held to be intact, then Utah and its subdivisions will have jurisdiction over nonIndians and the United States and the Ute Indian Tribe will exercise jurisdiction over Indians.

The Court is not being asked to rule on any questions relating to Ute Tribal property rights within the Uintah Valley Reservation. This is a jurisdictional dispute.[14] That

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[14] Moreover, this is a dispute focused on the jurisdictional rights of Indians. NonIndians are largely unaffected by disestablishment issues given the Court's holdings severely limiting

such a dispute requires the attention of the Court, 88 years after the Reservation was opened in 1905 arises because the surplus land statutes opening the Uintah Valley Reservation focused on changes in land tenure and did not address the boundary or jurisdictional issue. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

A. The Court's Rule for Determining Whether an Indian Reservation Remains Intact Is Settled and Straightforward – a State Must Demonstrate that Congress "Clearly" Intended to Remove Boundaries; Not Merely to Permit non-Indian Ownership of Reservation Lands.

1. A "Clear" Intent to Remove Boundaries Must Be Shown.

In *Solem* the Court confirmed that two alternative tests exist to determine whether Congress intended diminishment, and cautioned that under either test: "diminishment . . . will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found." *Solem*, 465 U.S. at 470. The first test

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federal and tribal authority over nonIndians living on fee lands within Indian Reservations. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) the Court ruled that the Tribes cannot assert criminal jurisdiction over nonIndians. In *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Court confirmed that on reservations, federal and tribal civil authority over nonIndians located on fee lands is significantly limited. With respect to such persons, the Tribe has no power to exclude and can assert civil authority only in rare situations where the nonIndian activity would, cause "demonstrably serious" impact which imperils "the political integrity, economic security or the health and welfare of the tribe." *Brendale, supra*, at 431.

focuses on the statutory language used to open the Indian lands. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* When such language is coupled with an unconditional promise by the United States to pay a sum certain for the lands, there is created an "almost insurmountable presumption" that Congress intended to diminish the reservation. *Id.*

In the alternative (in the absence of such explicit statutory language) the Court must look to surrounding events – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress," *Solem*, 465 U.S. at 471, to see whether such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."[15] *Id.*

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[15] In the event the Court can "unequivocally" find such a widely-held contemporaneous understanding the Court has been "willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged." *Id.* In effect, congressional intent is to be gleaned from an examination of what the Indians understood was occurring. This rule of statutory construction, like the rule that statutes are to be construed to favor Indians and as the Indians would have understood them *Choate v. Trapp*, 224 U.S. 665, 675 (1912), *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970), represents an acknowledgment by the Court of the unequal bargaining position of the parties, based on the superior negotiating skills and knowledge of the language on the part of representatives of the United States. *See Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979).

As a subpart to this surrounding-circumstances approach, the Court has looked to post-opening congressional, administrative, judicial, and demographic facts as "lesser" clues as to what Congress intended to accomplish. *Solem*, 465 U.S. at 471-472.

Under either test the burden of persuasion and of proof lies with those seeking to find diminishment – here, the State of Utah.

2. Boundaries Are Not Abolished When Indians and NonIndians Are Encouraged to Live Side by Side.

Before examining the particulars of the opening of the Uintah Valley Reservation, it will be helpful to review briefly the Court's five disestablishment cases. Those cases, in order of decision, are: *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and, *Solem v. Bartlett*, 465 U.S. 463 (1984).

Of these cases, only *Rosebud* considered an opening of a reservation where Congress did not intend Indians and nonIndians to live side by side thereafter. To the contrary, in *Rosebud* the reservation was divided into a nonIndian enclave and an Indian enclave.[16] That fact played a significant role in the Court's conclusion that the Indians had intended to surrender all of their interest in the lands at issue. Each of the other four cases involved implementation, by specific act, of the general allotment

[16] As the Court noted, the Indians in *Rosebud* understood that "[t]he cession of Gregory County . . . will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." *Rosebud*, 430 U.S at 591-92.

policies widespread in the Nineteenth Century. Those policies, well known to the Court, allotted some of the reservation lands to the resident Indians and opened the unallotted lands to nonIndians "with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways." *Mattz*, 412 U.S. at 496. Of the cases which implemented Congress's plan of "promoting interaction between the races and of encouraging Indians to adopt white ways," only one was found to have diminished the reservation in question. That conclusion was reached in *DeCoteau*, 420 U.S. at 446, because the Court found, in light of the unqualified language of Reservation surrender in an 1889 agreement, that the Indians and the United States both were satisfied that the mere retention of allotments, rather than the retention of the reservation boundary, would provide an adequate "fulcrum for tribal affairs."[17]

All this makes common sense. The Court, in effect, requires a showing, by clear and convincing evidence, that Indians have renounced all interest in reservation lands. Except in *DeCoteau*, the Court has found that showing impossible to achieve when allotment Act policies have been implemented to have Indians and nonIndians live on reservation land side by side.

At the same time, the Court has had no problem finding such a renunciation when the plan of the Indians

[17] The agreement of December, 1889, which was found to have "effected a simple and unqualified cession of all of the unallotted lands to the United States for a sum certain" provided that the Indians shall "cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation . . . remaining after the allotments. . . . " *DeCoteau*, 420 U.S. at 437-38, and 456.

and the Congress was to sever an identifiable block of reservation lands from the Indians' ownership and control. For example, in the case of the Colville Indian Reservation, the Court found that the north half of the original reservation had been diminished because Congress stated that it "be vacated and restored to the public domain." *Seymour, supra,* at 355-56. There was no plan that the north half be settled so that Indians and nonIndians could live side by side. Similarly, in *Mattz,* the court noted two other boundary disestablishment acts which ordered identifiable blocks of Indian land to be severed from Indian control: 15 Stat. 198, 221 (1868), which provided that the "Smith River Reservation is hereby discontinued," *Mattz,* 412 U.S. at 505, n.22; and 33 Stat. 218 (1904), "the reservation lines of the said Ponca and Oto and Missouria Indian Reservations be, and the same are hereby, abolished." *Id.* Then, in *Rosebud,* the Court found that 25 Stat. 896, § 21 (1889), created six separate Sioux Reservations out of the 25,000,000 acre Great Sioux Reservation and at the same time ceded to nonIndians a separate and specifically identifiable parcel. *Rosebud,* 430 U.S. at 589.[18]

B. The Opening of the Uintah Valley Reservation focused on homestead entry: No hard evidence exists to show a total surrender of all Tribal interests.

The relevant language of the Act of March 3, 1905, 33 Stat. 1048, 1069-70, under which the Uintah Valley Reservation was opened to nonIndian settlement provides:

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[18] In contrast, in the Uintah Valley Reservation at the 1905 opening, Indian-owned lands were dispersed in the Reservation and the identification of nonIndian ownership awaited the selection process authorized under the homestead and townsite entry laws.

> That the said unallotted lands . . . *shall be disposed of under the general provisions of the homestead and townsite laws of the United States,* and shall be opened to settlement and entry by proclamation of the President. . . . [Emphasis added.]

1. An analysis of the 1905 Act Shows That it Was Designed to Place Indians and NonIndians Side by Side.

Utilizing the standards set out in *Solem,* it is apparent that the 1905 Act fails to include any language of cession or words "evidencing the present and total surrender of all tribal interests." *Solem,* 465 U.S. at 470. In *Rosebud,* 430 U.S. at 597, and in *DeCoteau,* 420 U.S. at 445, the Court, in determining that the reservations in question had been disestablished, relied heavily upon express language of cession which it found to be "precisely suited" to disestablishment.

The cession language regarding the Rosebud Reservation authorized the Indians to "cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to" the land in question. *Rosebud,* 430 U.S. at 591, n.8. Furthermore, in *Rosebud,* the Court confirmed that the mere opening of the reservation to settlement (as we read that 1905 Act to contemplate) does not mean that the area has lost its reservation status. *Rosebud,* 430 U.S. at 586-587. The 1905 Act related to the Uintah Valley Reservation did not provide for the cession of all Indian interests. Rather, it limited the sale of unallotted lands to entries under homestead and townsite laws.

Finally, the 1905 Act expressly provided the method by which the Ute Indians would receive payment for the unallotted lands sold to nonIndian settlers after the opening of the Reservation. The Indians were to receive "[t]he

proceeds of the sale" of the surplus lands as opposed to a sum certain. The Court has concluded that a sum certain provision was consistent with an intent to terminate the reservation, *DeCoteau*, 420 U.S. at 448, and that an uncertain future proceeds provision dependent upon actual settler purchases of reservation lands is evidence of no diminishment. *Solem*, 465 U.S. at 473, *Mattz*, 412 U.S. at 503-504.[19]. In light of this analysis, it is not surprising that 12 years ago the federal courts in Utah concluded in an 85-page exhaustive analysis that, "Nothing in the legislative history of the 1905 Act *approaches* a clear expression of congressional intent to disestablish the Uintah Reservation . . . " *Ute Tribe District Ct.*, 521 F.Supp. at 1132 [emphasis supplied].[20]

Moreover, a review of Congress' actions leading up to the 1905 Act reveals no acceptance by the Ute Indians of a plan to surrender all of their interests in the Uintah Valley Reservation and to vacate it to nonIndians. A predecessor act, the Act of May 27, 1902, 32 Stat. 245, 263-64, provided that the Secretary of the Interior, with the consent of a majority of the adult male Indians should provide allotments and should restore all unallotted

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[19] In *Ash Sheep Co. v. United States*, 252 U.S. 159, 166 (1920), the Court held that this "installment" method of payment assured that Indians retained the beneficial title of the unsold land.

[20] After the *Ute Tribe District Ct.* case had concluded, and in its initial responsive brief to the Tenth Circuit in the Ute Tribe's appeal, the State could find little fault with the District Court on the Uintah Valley Reservation: "It is virtually impossible for any party to present a persuasive argument to show that the district court committed reversible error . . . [and] the court was sensitive and obedient to all relevant guidance by the U.S. Supreme Court." Opening Brief, State of Utah, on appeal to Tenth Circuit in *Ute Indian Tribe v. Utah*, p. 2-3.

lands to the public domain. The 1902 Act was amended by the Act of March 3, 1903, 32 Stat. 982, 997-998, which extended the time for opening the Reservation and instructed the Secretary of Interior to send an inspector to obtain the consent of the Utes, but provided that if no consent could be obtained the lands should nevertheless be allotted and the reservation opened.[21]

Because the allotment and opening process was not proceeding on the original time schedule, Congress moved again to have the Uintah Valley Reservation allotted and opened. On March 3, 1905, 33 Stat. 1048, 1069, Congress provided that the unallotted lands should be disposed of under the general provisions of the homestead and townsite laws of the United States and should be opened to settlement and entry by proclamation of the President.

The statutory sequence, summarized above, shows that from 1902 to 1905 Congress delayed the opening, removed the requirement of Indian consent and instructed the Secretary to open the unallotted lands to homestead and townsite entry only, rather than returning the unallotted lands of the reservation to the public domain. The plan selected by Congress to ultimately open the Uintah Valley Reservation lacked the two critical characteristics found by the Court to have accomplished a reservation extinguishment.

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[21] The change in the 1903 Act as it relates to obtaining Indian consent occurred as a result of the January 5, 1903 decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) where the Supreme Court confirmed that Congress possessed the power to unilaterally extinguish Indian reservations. Congress subsequently extended the time for opening the reservation a second time until March 10, 1905. Act of April 21, 1904, 33 Stat. 189, 207-208.

First, none of the Uintah statutes include express language of cession and sale found to be of critical importance by the Supreme Court in *DeCoteau* and *Rosebud*. For example, in *DeCoteau*, 420 U.S. at 437, Congress ratified an agreement voluntarily entered into by the Indians which provided that:

> [T]he Indians cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments. . . .

Similarly in *Rosebud*, 430 U.S. at 597, the Congress enacted a 1904 Act implementing the principal terms of a 1901 Agreement between the Indians and the United States. The 1904 Act, 33 Stat. 256, provided:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, ...

Second, the Uintah statutes did not vacate the reservation to the public domain prior to permitting entry under the public land laws. For example, in *Seymour* the Court considered two acts of Congress one of which "*vacated* and restored to the public domain" a portion of the Colville Indian Reservation. *Seymour*, 368 U.S. at 354 [emphasis added]. In fact, the language selected by Congress, in the setting of the Uintah Valley Reservation, uses the same language found by the Court and numerous courts of appeal *not* to have disestablished reservations. Thus, in *Seymour* the Court concluded that the words "such surplus lands shall be open to settlement and entry under the provisions of the homestead laws" together with a separate phrase authorizing townsite selection

"did no more than open the way for non-Indian settlers to own land on the reservation." *Seymour*, 368 U.S. at 356. Similarly, in *Mattz* the Court determined that limiting entry to homesteaders does "not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation." *Mattz*, 412 U.S. at 497.[22]

Support for the conclusion that Congress only planned to implement allotment Act policies and did not plan to have the Ute Indians vacate the Uintah Valley Reservation emerges from the fact that when the 1905 bill

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[22] The State of Utah keeps trying, without success, to sell the federal courts on the hypothesis that the predecessor 1902 Act, simply because it included the phrase "restored to the public domain," established a baseline intent to disestablish which was carried forward in the 1905 Act which actually opened the Reservation. As shown, *infra*, after *Solem* no basis exists to support a theory of baseline intent arising solely out of the words "public domain." Also in the present appeal there is no basis for applying the concept of carried intent, because in contrast to *Rosebud* where carried intent was utilized: (a) the parties do not agree that the Congressional intent of the 1902 and 1905 statutes is identical as the parties agreed in *Rosebud;* (b) there is no evidence of a continuing willingness by the Ute Indians to cede their lands as there was in *Rosebud;* and (c) there exists no legislative history showing a congressional understanding that the Uintah Valley Reservation was being reduced in size through the opening process as there was in *Rosebud*. In *Rosebud:* all parties agreed that the substance and intent of the various statutes making up the carried intent were the same, *Rosebud*, 430 U.S. at 606; a majority of the Sioux Indians agreed to each of the three separate diminishments reflected in the statutes; and the legislative history of the three acts repeatedly referred to the Rosebud Reservation as being a reduced size after the lands to be opened were removed from it. *Rosebud*, 430 U.S. at 608-612. Significantly, the Court of Appeals for the Ninth Circuit has refused to accept an argument of "carried intent," finding it to be "mere speculation." *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 958 (9th Cir. 1982).

reached the Senate, the Senate Committee on Indian Affairs deleted reference to Uintah Valley lands being returned to the "public domain" and limited entry by nonIndians to the homestead and townsite laws to assure that Indians and nonIndians would live side by side. *Indian Appropriations Bill for 1905-06,: Hearings on H.R. 17474 Before the Senate Subcom. on Indian Affairs,* 58th Cong. 3d Sess. (1905). Further, when the full senate considered the bill, the House's version containing "public domain" language was stricken, and the substitute language regarding the homestead and townsite laws was included. 39 Cong.Rec. 3522 (Feb. 27, 1905). Subsequently, the bill was enacted limiting the disposal of the surplus lands to settlers under the homestead and townsite laws only.[23]

2. The Surrounding Circumstances Show No Plan By the Ute Indians to Vacate their Reservation to NonIndians.

Furthermore, Utah has not shown, and cannot show, that the manner in which the opening of the Uintah Valley Reservation was negotiated with the Ute Indians

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[23] Further support for the proposition that Congress did not intend to disestablish the Uintah Valley Reservation is found by reviewing the comments of Representative Howell of Utah on the floor of the House. In discussing the 1905 Bill which sought to open the Reservation, he repeatedly emphasized the fact that the proposed opening would benefit the Indians by giving them more contact with nonIndian settlers. 39 Cong.Rec. 1181-1182 (1905). Thus, "[t]he Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Mattz, supra,* at 497; *Seymour, supra,* at 356.

and the tenor of the legislative reports presented to Congress during the period 1902-05 "unequivocally reveal a widely-held contemporaneous understanding that the affected reservation would shrink" as required by *Solem,* 465 U.S. at 471.

The most compelling evidence of a complete absence of a "widely-held contemporaneous understanding that the affected reservation would shrink" comes from the views of the Ute Indians, reported to Congress by Inspector McLaughlin, the very same federal official who successfully obtained the consent of the Sioux Indians to diminishment in *DeCoteau* and *Rosebud.* Compare the following reported understanding of the Indians:

Viewpoints of the Sioux Indians relied on by the Supreme Court in *DeCoteau* and *Rosebud*

We never thought to keep this reservation for our lifetime. *DeCoteau,* 420 U.S. at 433.

We don't expect to keep reservation. *Id.*

We can buy for ourselves what we need if payment is made in cash, and then we do not care to have an agency here after the surplus lands have been sold. The people have asked me to say this as their wish.

This little reservation is ours, and all we have left. There is nothing in our treaty that says we must sell. It was given us as a permanent home, but now we have decided to sell . . . *DeCoteau,* 420 U.S. at 435, n.16.

In *Rosebud* the Supreme Court noted that the 1904 and 1907 diminishment acts had the written consent of a majority of Indians and the 1910 diminishment act had in the words of Inspector McLaughlin the "practically unanimous concurrence" of the Indians.

Rosebud, 430 U.S. at 589, n.2, and at 610

Viewpoint of the Ute Indians

1. 1899 letter to Commissioner of Indian Affairs.

The Indians were unanimous and determined in their opposition to making cession to the government of any of their lands and to allowing an Uintah or White River Indian to take and hold an allotment in severalty on said reservation. *Ute Indian Tribe v. Utah*, 521 F. Supp. at 1113. [emphasis supplied]

2. 1898 Statement of Ute Delegation to Washington, D.C. *Our land is small and we do not want to sell it to anyone.* We do not want any commission sent there; we are opposed to that. We have no more land than we want ourselves for our own use. *Id.* [emphasis supplied]

3. 1902 Statement to Congress by Indian Affairs Commissioner. There is a sort of feeling among the ignorant Indians that they do not want to lose any of their land. That is all there is to it; and I think before you can get them to agree to open the reservation, you have got to use some arbitrary means to open the land. *Ute Indian Tribe*, 521 F.Supp. at 1114.

4. 1903 Report of Inspector McLaughlin to Secretary of Interior on his failure to get even 30% of the Utes to consent to a sale of their lands.

I deemed it proper to transmit the same, but with the explanation that the signers were as much opposed to the opening of the reservation without consulting the Indians as the non-signers were, but they thus expressed their acceptance of the law to show their good will and readiness to comply with the wishes of the Government. *Ute Indian Tribe*, 521 F.Supp. at 1118.

Obviously, this comparison confirms that the Ute Indians, unlike the Rosebud Sioux (*Rosebud, supra*) and the Sisseton-Wahpeton Sioux (*DeCoteau, supra*) were unwilling to abandon and vacate the Uintah Valley Reservation. To the contrary, they were reluctant to have non-Indians settle at all on the Reservation lands.[24]

C. The Post Opening Facts Do Not Show a Plan to Renounce All Indian Interests in the Uintah Valley Reservation.

The post opening congressional, administrative, judicial, and demographic facts, which are to be looked to as lesser clues of what Congress intended to accomplish, *Solem*, 465 U.S. at 471-72, also fail to show a "clear" intent to diminish. After the opening, Congress used various phrases to describe the Uintah Valley Reservation – some in the present tense, others in the past tense. The Department of the Interior did the same. *See Ute Indian Tribe v.*

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[24] The Utah Supreme Court improperly analyzes a portion of the 1903 *McLaughlin* report as evidence of an intent to surrender the Reservation boundary. *Perank*, 19 ILR at 5198-5199. In his report, McLaughlin states he told the Utes that after Congress' plan was finished they *each* "will have a boundary to your individual holdings." On their face, McLaughlin's comments address title. While, in 1903 individual allotment title could convey jurisdictional implications, it is clear today that individual allotment title is no longer relevant to the determination of Indian Country. *See*, 18 U.S.C. § 1151 and *Oklahoma Tax Commission v. Sac & Fox Nation*, No. 92-259, 113 S. Ct. ___, (1993) Importantly, McLaughlin who had successfully negotiated the Sioux voluntary cessions analyzed in *DeCoteau* and *Rosebud*, was honest in reporting his failure to obtain an Indian cession in Utah. As he reported, the Indians were "unanimously opposed to the opening of their reservation." *Ute Indian Tribe*, 521 F.Supp. at 1118.

Utah, 521 F.Supp. at 1142, n.191. More importantly, however, the Secretary of the Interior restored much of the unallotted acreage, which over the years had remained unentered, to the Uintah Valley Reservation. On August 25, 1945, Interior Secretary Ickes issued an order of restoration which included:

> [S]aid lands are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah and *are added to and made a part of the existing reservation*. . . . [25]

Ute Indian Tribe v. Utah, 521 F.Supp. at 1143.

Utah contends that an earlier administrative document confirms that the Uintah Valley Reservation was diminished. It relies on the Presidential Proclamation of July 14, 1905, 34 Stat. 3119, reprinted at 521 F.Supp. at 1174-1177, which triggered the opening of Indian lands authorized by Congress under the 1905 Act. The Proclamation at one point refers to the predecessor 1902 Act which proposed to return Reservation lands to 'public domain. More importantly, the operative part of the Proclamation (quoted below) makes an explicit reference to the Reservation as still in existence and to the fact that entry would be limited (as provided for in 1905 Act) to only homestead and townsites.

> Now, therefore, I, Theodore Roosevelt . . . do hereby declare and make known *that all the unallotted lands in said reservation* . . . will on and after the 28th day of August, 1905, . . . *be opened*

[25] The expression "added to and made a part of the existing reservation" in the order of restoration issued pursuant to the Indian Reorganization Act is fully consistent with the Supreme Court's finding in *Mattz* that restoration to tribal ownership of vacant and undisposed-of lands is evidence of continued reservation status. *Mattz*, 412 U.S. at 505.

> *to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States*. . . . [emphasis added]

When this Proclamation is contrasted with the Proclamation relied on by the Supreme Court in *Rosebud*, several observations are apparent. First, the Proclamation in *Rosebud*, 430 U.S. at 602, did not recite various unilateral opening acts of Congress (only one of which used the phrase, "public domain"); rather the Proclamation expressly referred to the written cession and relinquishment of Indian interests in the Reservation lands:

> Whereas by an agreement between the Sioux tribe of Indians on the Rosebud Reservation, in the State of South Dakota, on the one part, and James McLaughlin, a United States Indian Inspector, on the other part, amended and ratified by act of Congress . . . the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied, unto the United States of America, all their claim, title and interest of every kind and character in and to the unallotted lands embraced in the following described tract of country now in the State of South Dakota, . . .

Second, in contrast to the Uintah Proclamation where the President described the lands to be entered as "all the unallotted lands in said reservation," in *Rosebud* the President described the opened lands very differently, as "all of the lands so as aforesaid ceded." *Id.* In Mr. Hagen's view, while the *Rosebud* Proclamation is undoubtedly an "unambiguous contemporaneous, statement, . . . of a perceived disestablishment" *Rosebud*, 430 U.S. at 602-603, the Uintah Proclamation is an equally unambiguous and

contemporaneous acknowledgment that the Uintah Valley Reservation survived intact the opening Act, the Act of March 3, 1905.[26]

Finally, the post-opening history of the Uintah Valley Reservation includes overlapping evidence of federal/tribal assertions and of state prosecutions. In the words of the Utah federal courts: "One thing is certain: the jurisdictional history of the Uintah and Ouray Reservation is not one of 'unquestioned' exercise of state authority." *Ute Indian Tribe v. Utah*, 521 F. Supp. at 1146.

While the analysis of post-opening evidence could extend for pages, it is apparent that once the State of Utah's contention that the phrase "public domain" created a 1902 baseline intent which was carried forward to the 1905 opening act, is set aside as inconclusive, virtually no evidence remains which approaches the Supreme Court's threshold to find diminishment:

> There are, of course, limits to how far we will go to decipher Congress intention in any particular surplus land Act. When both an Act and its legislative history fail to provide *substantial and compelling evidence* of a congressional intention to diminish Indian lands, we are bound by our

[26] Because Mr. Hagen does not believe the phrase "public domain," in and of itself, establishes a *prima facie* case of diminishment, he attaches little significance to the fact that President Roosevelt's Proclamation references both the 1902 Act and the 1905 Act. In Mr. Hagen's view, the significant portion of the Proclamation lies in the operative phrase "the unallotted lands . . . will be opened to entry, settlement, and disposition under the general provisions of the homestead and townsite laws. . . ." As noted earlier, this language is virtually identical to the opening language, "all of the lands . . . are hereby declared to be subject to settlement, entry and purchase" found not to have diminished a Reservation in *Mattz*, 412 U.S. at 495-96.

> traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening [emphasis added] *Solem*, 465 U.S. at 472.

Accordingly, we now turn to the theme of the State of Utah that the words "public domain," when appearing in an opening act, conclusively establish an intent to diminish.

D. Utah's Reliance on Public Domain Language Is not Sufficient to Show a Clear Intent to Disestablish.

The Court in *Solem* nine years ago held that use of the words "public domain" does not, in and of itself, constitute clear congressional intent to diminish. Rather, the words are mere evidence of a congressional understanding that the Indian lands would be available for settlement and that the boundaries *may* have been diminished, *Solem*, 465 U.S. at 475, but the words as a matter of law do not "carry the burden of establishing an express congressional purpose to diminish." *Id.*[27]

Moreover, this finding in *Solem* is consistent with what the Court has observed about the phrase "public domain" in earlier cases. The Court has never determined

[27] Indeed, in *Solem* the Court found no diminishment even where the opening statute contained the phrase, "within the respective reservations thus diminished" as well as the phrase "part of the public domain." *Solem*, 465 U.S. at 474-75. Before *Solem*, the Eight Circuit had concluded that the phrase "as diminished" is ambiguous insofar as it could either relate to the reduction in Indian land holdings or to a change in boundaries, and does not demonstrate a clear congressional intent to disestablish the reservation boundaries. *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 820 (8th Cir. 1983).

that the words "restore to the public domain" in and of themselves are evidence of diminishment. Utah continues to make this argument, but it is wrong. Indeed, Utah and its counties were finally rebuffed in *Solem*, itself. In that decision, the Court referred specifically to the Utah Counties of Duchesne and Uintah as *amici curiae* who unsuccessfully argued before the Court that the presence of the words "public domain," in and of itself, demonstrates diminishment. *Id.*, n.16.

What the Court said prior to *Solem* about the legal meaning of "public domain" has always been a passing reference and never definitive.

For example, in *DeCoteau*, 420 U.S. at 446, the Court observed:

> That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much.

But this quote does not tell us what aspects of the "other agreements," taken separately or together, stripped the lands of reservation status, and it is entirely unfair (and inaccurate after *Solem*) for Utah to contend that restoring Indian lands to the public domain in and of itself extinguishes a reservation boundary.

Again, in *Mattz*, 412 U.S. at 504, n.22, the Court observed:

> Congress has used clear language of express termination when that result is desired. See, for example . . . [t]hat the North Half of the Colville Indian Reservation . . . 'be, and is hereby, vacated and restored to the public domain.'

A fair reading of the relevant Colville Reservation opening act (summarized below) will show that Congress inserted on several occasions the word "vacate" to show

a surrender of reservation boundary and did not rely solely on the phrase public domain:

> That . . . all the following described tract or portion of said Colville Reservation . . . be, and is hereby, *vacated* and restored to the public domain.
>
> That each and every Indian now residing upon the portion of the Colville Indian Reservation hereby *vacated* and restored to the public domain, and who is also entitled to reside thereon, shall be entitled to select from said *vacated* portion eighty acres of land. Such selections shall be made within six months after the date of the President's proclamation opening the lands hereby *vacated* as are not occupied by or in the possession of any other Indian or Indians. [emphasis supplied]

27 Stat. 62-64 (1892).

The argument we make here (that restoring to the public domain is an expression confirming that Indian lands are open to public entry, and is typically inserted by Congress in both statutes that diminish and statutes that do not diminish) is supported in several cases. As the Colville Act, *supra*, shows, "restoring to the public domain" is language inserted after and independent of language which shows that Indians have relinquished their interest in the reservation through a cession agreement or through explicit congressional language of diminishment. The recognition that relinquishment of Indian interests in reservation lands comes first and then placement of the lands in a posture for public entry comes second is also clearly revealed in the setting of the Uintah Valley Reservation. Thus, in discussing the Gilsonite Strip, the Commissioner of Indian Affairs stated in 1895 that the 1888 Act "had been fully executed in accordance with its intent so far as the securing of the consent

of the Indians to the *diminution of their reservation and the restoration of said strip of land to the public domain . . .* " *Ute Indian Tribe v. Utah,* 521, F.Supp. at 1100.

To conclude, Congress's use of the phrase "restore to public domain" is a short-hand way of designating how the former Indian lands would be disposed. But independent language (such as an expression of cession or words inserted by Congress like "vacate") are required to accomplish the first event – namely the relinquishment and full surrender of Indian title and jurisdictional interests in the lands to be opened to entry.

CONCLUSION

The Court should reverse the Supreme Court of Utah's decision and dismiss, with prejudice, Robert Hagen's conviction, in light of the Utah Supreme Court's denial of Mr. Hagen's constitutional rights by submerging his criminal appeal in that of another defendant, Clint Perank, and in light of the Utah Supreme Court's failure to honor the Court's precedent requiring a clear and unequivocal congressional plan to disestablish.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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18 USC

18 USC § 1151. Indian country defined.

Except as otherwise provided in sections 1154 and 1156 of this title [18 USCS §§ 1154 and 1156], the term "Indian country", as used in this chapter [18 USCS §§ 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

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18 USC § 1152. Laws governing.

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations,

the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

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18 USC § 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USCS § 2241 et seq.], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title [18 USCS § 661] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.